

SOUTH AFRICA / JUDGMENT

Sithole and Another v Media24 (Pty) Ltd and Others (2023/070374) [2023] ZAGPJHC 884 (8 August 2023) [2023] ZAGPJHC 884

COURT

South Gauteng High Court, Johannesburg

BEFORE

Ingrid Opperman

CASE / FILE NUMBER

2023/070374

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REPUBLIC OF SOUTH

AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG LOCAL

DIVISION, JOHANNESBURG

Case

No: 2023/070374

REPORTABLE

OF INTEREST TO OTHER

JUDGES

REVISED

In the matter between:

LEMANE

BRIDGMAN SITHOLE

1st

APPLICANT

MICHAEL

MATSHIDISO MAILE

2nd

APPLICANT

and

MEDIA24

(PTY) LTD

1st

RESPONDENT

ADRIAAN

BASSON

2nd
RESPONDENT
PIETER
DU TOIT
3rd
RESPONDENT
SIPHO
MASONDO
4th
RESPONDENT
KYLE
COWAN
5th
RESPONDENT
AZARRAH
KARRIM
6th
RESPONDENT
HENRIETTE
LOUBSER
7th
RESPONDENT
WILLIE
DURAND SPIES
8th
RESPONDENT

Coram: Ingrid Opperman J

Heard: 2 August 2023

Delivered: This
judgment was handed down electronically by circulation to the
parties' legal representatives by email. The date and time
for
hand-down is deemed to be 10h00 on 8 August 2023

Summary: Urgent proceedings – application for an interim interdict
prohibiting a media house and journalists from referring to them
as
members of the 'Alex Mafia,' pending an action to be
instituted – Abuse of court process – factors considered
– urgency where there is none, altering case in reply, purpose
of relief is to improperly punish and to make examples of
the
respondents, multiple other media houses published pieces along the
same lines yet no interdict was sought against them, such
publications remain online, the relief, if granted, would be
ineffectual - Principles applicable to judicial prior restraint
orders
(‘gagging orders’) restated – Punitive costs
order granted.
ORDER

The matter is struck off
the roll with costs, as between attorney and client, such costs

JUDGMENT

INGRID OPPERMAN J

Introduction

[1] The applicants approach this court urgently to interdict the respondents from referring to them as members of a so-called ‘Alex Mafia’ (the relief has changed considerably from when the application was launched but more about that later). The interdict is sought against a large media house, two of its editors-in-chief and four of its journalists. Insofar as the large media house – Media24 – is concerned, the interdict sought only concerns articles and/or opinion pieces published by two of its titles: News24 and Netwerk24. No such limitation is sought that covers publications in any other Media24 title and/or on any social media platform. The interdict is sought pending the final determination of an action yet to be instituted by the applicants against all eight respondents.[1]

Purpose of the application

- [2] The applicants tell this court under oath, that at its core, the application seeks to interdict the first to seventh respondents from ‘repeating unsubstantiated and unproven allegations about Mr. Maile and me [Mr Sithole] that identify us as core members of the so-called "Alex Mafia"’. Mr Sithole then states that such allegations are contained in certain publications which he lists and which he defines as ‘the impugned publications’. The impugned publications include 6 of the publications listed below[2]. To identify them they have been typed in bold font in the list.
- [3] Mr Sithole refers to the article published on 22 August 2022 as Mr Basson’s ‘recent article’, that is the one published 11 months ago, and says that Mr Basson appears to have been unable to do anything more than rehash allegations that remain both unsubstantiated and unproven labelling them as having been defamatory in 2007 and remaining defamatory ‘today’. He deposed to his affidavit on 17 July 2023.
- [4] The interdict the applicants seek, so they contend, is interim in nature and should be operative pending the final determination of an action to be instituted against the respondents in this Court within 30 days of the granting of the interdict. It should be noted that no action was instituted in 2007. No action was instituted in August 2022. No action has yet been instituted.

Facts which are largely undisputed

- [5] Both the first and second Applicants formed close relationships with Mr Paul Mashatile, the current Deputy President (Mr Mashatile), during the years of the struggle. They met him in the mid-1980's as members of the Alexandra Youth Congress, a political organisation that played a role in the struggle for a democratic South Africa. During the state of emergency, all three of them were arrested and detained without trial for extended periods under the then extant 'emergency' legislation. Their friendships endured into the post-apartheid era and they remain friends.
- [6] When Mr Mashatile was Gauteng MEC for Housing, he appointed Mr Maile as head of the Alexandra Renewal Project, and Mr Sithole as his administrative secretary. After Mr Mashatile became Gauteng MEC for Finance in 2004, he appointed Mr Maile as the CEO of the Gauteng Shared Services Centre (GSSC) and Mr Sithole as Deputy-Head of the Gauteng Development Agency (GEDA).
- [7] During the period 2004 to 2007, Messrs Mashatile, Maile, Sithole and Kekana formed an investment company called Dibata Bata Investments (Pty) Ltd. Mr Sithole and Mr Kekana formed Mowana Investments with Mr Mashatile as a 10% shareholder. Mr Mashatile was also a co-investor with Mr Sithole and Mr Maile in Gadlex which had previously been named Business Connection Holdings and Business Connection Investments. The GSSC awarded two-multimillion-rand tenders to Business Connexion in which Mr Sithole was a shareholder through Gadlex. Later, the GSSC awarded Business Connexion another tender worth approximately R10,5 million. Mr Sithole was appointed a director of Business Connexion in 2004 and resigned in 2009.

Publications

- [8] The following articles (amongst others) have been published since 20 July 2007 to 21 July 2023[3]:

20 July 2007 Mail & Guardian published "A powerful political persona", naming the second applicant as 'Alex mafia' 31 August 2007 Mail & Guardian published an article authored by Mr Basson and another titled "Mashatile and the 'Alex mafia'" naming the applicants. 3 May 2009 Sunday Times published "Where to now for the Alex Mafia?", naming the applicants 18 August 2009 Sowetan published "DA blasts road tender award", naming the second applicant as "Alex mafia" 18 March 2011 Mail & Guardian published "Stressed lawyers 'massage' figures", naming the second applicant as "Alex mafia" 3 April 2012 Daily Maverick published "2017, Paul Mashatile's time", naming the applicants as "Alex mafia" 20 May 2014 eNCA published "David Makhura takes over as new Gauteng Premier", naming the applicants as "Alex mafia" 22 August 2022 7 December 2022 News24 published an article authored by Mr Basson titled "The silent power of Paul Mashatile" Daily Maverick published an article titled "Who is Paul Mashatile? The man who would be ANC king – never, ever bet against Paul Mashatile", which identifies applicants as members of the 'Alex Mafia'. 26 June 2023 26 June 2023 3 July 2023 5 July 2023 7 July 2023 21 July 2023 News24 launched a special project – with a dedicated webpage – titled "MASHATILE UNMASKED: A president in waiting: Inside his life of excess". News24's Mr du Toit, Mr Masondo,

and Ms Karrim hosted a podcast titled “Bling rings, love pentagons and mafia mobs – unmasking Mashatile’s millions”. News24 published the podcast of 26 June 2023. News24 published an open invitation titled “BOOK YOUR SPOT: News24 webinar delves into Paul Mashatile's inner circle and life of excess” Netwerk24 published an opinion piece authored by Mr Spies (eighth respondent) titled “Van Alex-mafia tot mafiastaat” News24 published an article authored by “News24 Reporter” titled “Mashatile's friends launch urgent court bid to stop News24 calling them the 'Alex Mafia'”

Internet exposure

[9] Mr Basson attached to his affidavit a schedule of mainstream media references to ‘Alex Mafia’. The chronology starts on 29 July 2007 and ends on 13 July 2023. That is sixteen years. It contains 46 mainstream media references. They are contained in a wide range of publications including the Mail & Guardian, the Sunday Times, Daily Maverick, Business Day, Financial Mail, The Citizen, to name but some. He explains that a simple Google search of the term ‘Alex Mafia’ returns 38 100

results, while limiting this to news articles returns 3500 results.

Urgency

[10] Rule 6(12) defines the test for having a matter determined on the urgent roll as opposed to the ordinary roll and it provides in relevant part as follows:

- (a) In urgent applications the court or a judge may dispense with the forms and service provided for in these Rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these Rules) as to it seems meet.
- (b) In every affidavit or petition filed in support of any application under paragraph (a) of this subrule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he [she] could not be afforded substantial redress at a hearing in due course. (emphasis provided)

[11] The question which falls for consideration is why the matter had to be enrolled in this urgent court affording the respondents only 2 days to file their notice of opposition and 2 days to file an answering affidavit. The answer should be found explicitly in the founding affidavit. Mr Sithole stated that:

‘we cannot be expected to wait for a hearing while the damage continues to unfold.....it was only with the publication of the podcast, and the events that followed, that it became clear to us that the current focus on Mr Mashatile would be sustained, and that we were likely to continue to be identified as members of the so-called Alex Mafia. This insight was vindicated with Netwerk24’s publication of Mr Spies’s piece’. (emphasis provided)

[12] Two issues flow from this: (a) who identified/identifies the applicants as members of the 'Alex Mafia' and (b) what triggered the current urgency which was not present in 2007 and in August of 2022 when the applicants were identified as members of the so-called 'Alex Mafia'?

Origins of the term 'Alex Mafia'

[13] Mr Basson says the following:

'62. We did not coin the term "Alex Mafia". It originated in political circles, and in fact within the ANC itself. Mr Mashatile

himself explained this in an interview with the Financial Mail, as recorded in an article dated 4 August 2022 entitled "A deputy president in waiting?", a copy of which is attached marked "AB22":

He's nicknamed "The Don" of the "Alex Mafia" - though he's quick to explain that the term simply refers to a group of 1980s comrades from the township who went on to serve in government. The name harks back to the 1960s, when it was used for a group of leaders that included Umkhonto we Sizwe's Joe Modise and Josiah Jete, as well as Thomas Nkobe and Joe Nhlanhla.

"It is political ... there is nothing illegal about it," he says with a laugh.

63. A confidential source with direct and detailed knowledge of Mr Mashatile's history and the inner workings of the group known as "Alex Mafia", confirmed to Mr Pieter du Toit, the third respondent, that the applicants are widely known as members of the group, and further stated: "Everyone calls them the 'Alex mafia'. They call themselves that. People in Alex call them that." A confirmatory affidavit will be filed by the third respondent.' (emphasis added)

[14] The confirmatory affidavit by Mr du Toit was filed [4].

[15] Instead of doing the obvious thing i.e. dealing with the substance of the simple allegation of whether they call themselves the 'Alex Mafia' or not, the applicants attack the nature of the evidence as being hearsay. A simple 'Yes, we call ourselves "the Alex Mafia"' or 'No, we don't call ourselves "the Alex Mafia"' could have been tendered.

The urgency trigger

[16] Mr Jonathan Berger representing the applicants, argued that insofar as the term 'Alex Mafia' might have had an innocuous meaning up until and including 22 August of 2022 (which he did not concede), this changed when the respondents in July of 2023 started adding words such as 'gang', 'mob' and 'notorious'.

[17] Reliance on that suggested changed circumstance to bolster the urgency argument, in my view, fell by the wayside when the relief in paragraph 2.2 of the applicants' notice of motion was abandoned by the applicants who sought leave to amend their notice of motion by deleting prayer 2.2. The relief initially sought by them was couched, in relevant part, as follows:

‘2. Pending the final determination of an action to be instituted by the applicants against the respondents in this Court within 30 days of the date upon which an order is handed down in this urgent application, interdicting the first to seventh respondents from –

2.1 referring to the applicants, either individually or collectively, as members of a so-called "Alex Mafia", in any communication and/or publication of the first respondent and/or its titles, including but not limited to News24 and Netwerk24, and/or on any social media platform, including but not limited to Twitter, Threads, Facebook, Instagram, and WhatsApp; and

2.2 repeating any unsubstantiated and/or unproven allegation contained in an article authored by the second respondent titled "Mashatile

and the 'Alex mafia '", published on 31 August 2007 by the Mail & Guardian; (the abandoned relief)

[18] The effect of the amendment, if granted, is to limit the relief to prayer 2.1 where what is sought to be prohibited is the publication of references to the applicants as members of the ‘Alex Mafia’. But that appellation was published in 2007 and numerous times thereafter as is evidenced by the list of publications herein. The relief in its current form does not seek to prohibit publications of references to the applicants as members of a ‘gang’, ‘mob’ or of being ‘notorious’. Thus, if the term ‘Alex Mafia’ is defamatory per se as argued by the applicants, then they ought to have approached the court much sooner – 16 years ago or at least after the 22 August 2022 publication. If the term ‘Alex Mafia’ was innocuous until the words ‘gang’, ‘mob’ and ‘notorious’ were added, then the relief sought should address this which it does not.

[19] In order to overcome the insurmountable difficulties pointed out in the answering affidavit, the relief sought in paragraph 2.2 was abandoned by the applicants. That left the applicants with the relief sought in paragraph 2.1 only, to which no urgency whatsoever attaches by virtue of their inaction in relation thereto for a period spanning 16 years and by virtue of what is elaborated upon hereinafter.

Statement in the public domain

[20] For many years, Mr Basson’s affidavit demonstrates, the Internet has been replete with references to the applicants as members of the “Alex mafia”. The applicants did nothing about it, despite their claims that the core of their case is about these impugned allegations first arising in 2007 and being defamatory then.

[21] The fact that the reference has been repeated more recently does not make the matter suddenly urgent. The allegedly defamatory matter is firmly in the public domain and has been for at least sixteen years. At best for the applicants, they have waited almost a year to bring this application.

[22] The reasoning of Tolmay J in *Mokate v UDM* is apposite:

‘I am of the view that in the light of the fact that the publication took place on 17 June 2020 [three weeks before the hearing], the statement has been in the public domain for a significant time and the harm that may have been done, has already occurred. The proverbial horse has bolted. Such harm that Dr Mokate may suffer, due to the statements, can be addressed in due course when the matter is heard and the

issues

between the parties are properly ventilated. She will be able to obtain redress at a hearing in due course, as all other litigants in defamation matters do.’[5]

[23] I held in *Mabote v Fundudzi Media*:

‘By the time the respondent published its article, it was already in the public domain that applicant had been involved in a romantic relationship with Mr Edwin Sodi. No action has been taken by applicant against Opera News or any of the other publications. There seems to be merit in the argument that whether this Court grants the applicant the relief she seeks or not (apart from the one million rand which she does not seek be awarded to her by the urgent Court) her reputation will not undergo any material change for it is already what it is and the publications above listed have seen to that. Courts are not inclined to grant orders that will have only academic effect, and this must weigh in the overall decision.’[6]

The significance of the amendment

[24] Mr Berger argued that instead of giving the respondents notice of their intention to amend the notice of motion, the applicants could simply have instructed counsel – in oral argument – to abandon the relief sought in prayer 2.2, as well as the broad reach of prayer 2.1 (to the extent that it applies to Media24). Had that been done, counsel for the respondents would have

wasted time preparing heads of argument on issues that are no longer in dispute. This Court would have wasted its time too, so the argument ran. In the context of an urgent application, that would have been particularly unfortunate. If the amendment is refused, the relief will remain in its original form but the applicants have already, under oath and in their replying affidavit, abandoned any relief wider than that contained in the amendment.

[25] I agree with Mr Berger’s approach as a matter of principle. I agree too that practically it makes no difference from the applicant’s vantage point. However, from the respondent’s perspective it is not so innocuous.

[26] Mr Du Plessis SC, representing the 1st to 7th respondents, argued that the reason for this about-face on the part of the applicants seeking the amendment is because the answering affidavit demonstrated, overwhelmingly, that the facts reported in the 2007 Mail & Guardian article were true and for the public benefit, and that those facts would more than justify referring to the applicants as “Alex

Mafia” (even if that was not already their popular nickname). He submitted that the applicants now seek to sever their case from the 2007 Mail & Guardian article, its original anchor. They do this because seeking to ban a 16-year-old article by an uncited publisher would guarantee

that their application would be struck from the roll either for lack of urgency or material non-joinder. He argued that the applicants

want to amend their notice of motion to abandon the most serious relief – on which their case was founded, and on which their

pre-litigation demands were based – to persist only with a ban on the respondents referring to them as “Alex Mafia”.

He argued that shifting the relief reveals that the original notice of motion was a gross overreach, and thus an abuse.

The Press Council

[27] The applicants approached the urgent court without having attempted to obtain relief at the Press Council of South Africa, the body

recognised by statute as an effective regulator.[7] On 6 July 2023, in their attorney’s letter of demand, they allege transgressions of journalistic duties as regulated by the Press Code of Ethics and Conduct for South African Print and Online Media and reserve their rights to lodge a formal complaint with the Press Ombud. They demanded that the respondents desist from referring to the applicants as the ‘Alex Mafia’ or that they form part of an illicit ‘mob’ and further demanded an undertaking to retract references thereto and to print an apology.

[28] It does not mean that a litigant cannot approach the urgent court for relief against a Press Council member without approaching the Press Council first. Of course, they can. Rather it means that a litigant approaching the urgent court should explain why they have not pursued the potentially speedier remedies available from the Press Council,[8] particularly where they threatened that they would approach it. An urgent remedy at the Press Council, was apparently available for the taking. Having waited 16 years (at worst) or 11 months (at best) and having threatened that an approach to the Press Council would be made in the absence of an undertaking, and no undertaking having been forthcoming to satisfy the applicants’ demands, one would’ve expected this change of course (from Press Council to Court) to have been explained in the founding affidavit. It was not.

Abuse

[29] I am driven to conclude that this application is an abusive attempt by two politically-connected businessmen to gag a targeted newsroom from using a nickname – “Alex mafia” – by which the applicants are popularly known and called by the public, politicians, political commentators, other newsrooms, and themselves – and have been for at least 16 years. In my view, the applicants have abused the court process, by claiming urgency where there is none, by materially altering their case in reply, and by seeking relief which will have no

purpose other than to improperly punish and make a chilling example of the first to seventh respondents. Multiple other media houses have published pieces along the same lines, yet no interdict is sought against them even though the publications remain online.

- [30] To recap, the applicants initially approached the urgent court for a wide banning order prohibiting the repeating of the contents of a 16-year-old article published by an uncited third party, the Mail & Guardian (so too the co-author, Mr Brummer). The article in the Mail & Guardian was about Mr Paul Mashatile and the so-called “Alex mafia” of which he was a leading member. The article stated:

‘The ‘Alex mafia’ is a reference to a group of former activists from Alexandra township who have risen to positions of influence. Mashatile, Mike Maile, Nkenke Kekana and Bridgman Sithole are at its core.’

- [31] An interdict prohibiting publication (whether interim or final) is known as a judicial “prior restraint”, or more colloquially as a “banning order” or “gagging order”. It impinges on the right to freedom of expression enshrined in section 16(1) of the Constitution, which includes freedom of the press and other media, as well as the freedom “to receive and impart information and ideas”.

- [32] In *Print Media*, the Constitutional Court (per Skweyiya J) held:

‘The case law recognises that an effective ban or restriction on a publication by a court order even before it has ‘seen the light of day’ is something to be approached with circumspection and should be permitted in narrow circumstances only.[9]

- [33] Even the Appellate Division, pre the democratic era, held that such banning orders should very rarely be granted. In *Heinemann*, Rumpff JA held as follows:

‘When a Court of law is called upon to decide whether liberty should be repressed – in this case the freedom to publish a story – it should be anxious to steer a course as close to the preservation of liberty as possible. It should do so because freedom of speech is a hard-won and precious asset, yet easily lost.’[10] (emphasis provided)

- [34] Applying *Print Media* last month, this Court (per Sutherland DJP) held in *Mazetti v amaBhungane* that:

“[A] South African court shall not shut the mouth of the media unless the fact-specific circumstances convincingly demonstrate that the public interest is not served by such publication”.[11]

- [35] Sutherland DJP also cited *Midi TV*, where the Supreme Court of Appeal held as follows:

‘[19] In summary, a publication will be unlawful, and thus susceptible to being prohibited, only if the prejudice that the publication might cause to the administration of justice is demonstrable and substantial and there is a real risk that the prejudice will occur if publication takes place. Mere conjecture or speculation that prejudice might occur will not be enough. Even then publication will not be unlawful unless a court is satisfied that the disadvantage of curtailing the

free flow of information outweighs its advantage. In making that evaluation it is not only the interests of those who are associated with the publication that need to be brought to account but, more important, the interests of every person in having access to information. Applying the ordinary principles that come into play when a final interdict is sought, if a risk of that kind is clearly established, and it cannot be prevented from occurring by other means, a ban on publication that is confined in scope and in content and in duration to what is necessary to avoid the risk might be considered.

[20] Those principles would seem to me to be applicable whenever a court is asked to restrict the exercise of press freedom for the protection of the administration of justice, whether by a ban on publication or otherwise. They would also seem to me to apply, with appropriate adaptation, whenever the exercise of press freedom is sought to be restricted in protection of another right. And where a temporary interdict is sought, as pointed out by this Court in *Hix Networking Technologies*, the ordinary rules, applied with those principles in mind, are also capable of ensuring that the freedom of the press is not unduly

abridged. Where it is alleged, for example, that a publication is defamatory, but it has yet to be established that the defamation is unlawful, an award of damages is usually capable of vindicating the right to reputation if it is later found to have been infringed, and an anticipatory ban on publication will seldom be necessary for that purpose. Where there is a risk to rights that are not capable of subsequent vindication a narrow ban might be all that is required if any ban is called for at all. It should not be assumed, in other words, that once an infringement of rights is threatened, a ban should immediately ensue, least of all a ban that goes beyond the minimum that is required to protect the threatened right.’[12] (emphasis provided)

[36] Against this background, the courts have set a very high threshold for an interdict (whether interim or final) against allegedly defamatory speech.

[37] In the case of *Malema v Rawula*,[13] the Supreme Court of Appeal collated the trilogy of leading cases relating to the remedy of an interdict to restrain the imminent or continued publication of defamatory statements and that a party is not entitled to approach the court unless it is clear that the defendant has no defence. A good reason for setting such a high threshold for an interdict against speech is that the respondents are deprived of the truth-finding facilities of trial proceedings – discovery, subpoena, and cross-examination, by way of example. And of course also because the applicants have an alternative remedy available to vindicate their reputational rights being an action for damages.

[38] The applicants rushed off to court to prevent the publication or repeated publication of ‘unsubstantiated and/or unproven allegations’ contained in an article published on 31 August 2007. This was stated to be their core concern both in their letters of demand and in the founding affidavit. They then abandoned this relief in their replying affidavit when the answering affidavit revealed that they will not be able to show that it is clear that the respondents have no defence. They now seek a ban only on any reference to the applicants as members of a so-called ‘Alex Mafia’ this under circumstances where the common cause

facts reveal that the respondents did not invent the nickname “Alex mafia”. It originated in the political discourse of the African National Congress itself. The applicants do not dispute the hearsay evidence that they refer to themselves by this nickname. They only object that this evidence is hearsay. This is evasive, and the inference I draw, which inference is the most plausible, is that the applicants do indeed refer to themselves as members of the “Alex mafia”. Hearsay evidence may be received in urgent applications and the failure of the applicants to have objected to this title over a sixteen year period, lends credence to the truth of the content of the communication to Mr du Toit.

- [39] This application is an abuse of the urgent Court’s process. After sixteen years, the applicants cannot have any bona fide basis for approaching the Court on the basis of extreme urgency. They afforded the respondents a mere two court days to file an answering affidavit, in a complex case. Notably, in respect of the same period, I said this in Mabote:

‘The application was served on 22 October 2020 and the respondent was required to file an answering affidavit by Tuesday 27 October

2020. This afforded the respondent two court days to prepare its answering affidavit. As Cachalia J said in *Digital Printers v Riso Africa (Pty) Ltd*:

‘The urgent court is not geared to dealing with a matter which is not only voluminous but clearly includes complexity and even some novel points of law.’

- [40] The interdict sought by the applicants would be ineffective, a factor which must weigh with a Court deciding whether its order would have any practical effect. The interdict would not scrub the Internet of the many existing references to the applicants as “Alex Mafia”, and would not ban third parties from calling them by that nickname. The irresistible inference is that the true purpose of this application is not to preserve the applicants’ reputations of which membership of the “Alex mafia” is already an embedded part, and where those reputations will not undergo any material change, given that the allegations and nickname already form the subject of widespread public comment. What then is the application about?

- [41] It appears, submitted the respondents, designed to punish the respondents, to make an example of them, and thereby to send a chilling message to other media and members of the public that they risk being hauled to urgent court to face opprobrium from politically connected figures of influence and resources and the risk of heavy costs orders if they use the nickname.

- [42] While the application does not bear all of the hallmarks of a SLAPP[14] suit it does bear two of them – the ulterior objectives of punishment and deterrence. In any event, it is an abuse of process to bring a civil action or application for any purpose ulterior to the genuine protection or vindication of a right.[15]

Fate of this application

- [43] For these reasons I do not intend enrolling this matter as an urgent application and to permit the applicants to jump the queue to be heard. I intend striking it from the roll for want of urgency. I have not dealt with the merits of the application in any depth but inevitably some traversal of the merits is required to arrive at a conclusion on urgency. I have concluded that it is not deserving of being called urgent. But should mention that had I enrolled the matter as one of urgency, I would have dismissed it on the basis held by Van Wyk J in *Juta & Co* at the very least.
- [44] In *Juta & Co*,^[16] an application for an interim interdict was dismissed on the grounds of the applicant's unexplained delay in approaching the court in circumstances where, had final relief been sought, the proceedings deciding the final relief question could have been heard within the time that it took the applicants to launch their claim for interim relief. Observing that "[t]here is such a thing as the tyranny of litigation", Van Wyk J stated that relief *pendente lite* is a special remedy which, "from its very nature, requires the maximum expedition on the part of an applicant". Erasmus summarises the position as follows:^[17]
- 'An interlocutory interdict may be refused if the applicant has delayed long before applying. An application for an interdict *pendente lite* from its very nature requires the maximum expedition from an applicant, who may forfeit his right to temporary relief if he delays unduly in bringing the interim proceedings to finality.'
- [45] The failure to have acted in 2007, the failure to have acted in August of 2022 and the failure to have instituted an action for final relief to date hereof, would have driven me to conclude that the applicants have, as in *Juta & Co*, forfeited their rights to interim relief.
- [46] Because I will be striking it, I need not deal with the amendment to the notice of motion. This, however, does not preclude me from having regard to all that serves before me in order to make an appropriate costs order as in my view, there must be consequences to the conduct described herein.

Costs

- [47] This application is an abuse of process as the Court's rule in respect of urgency was used for a purpose other than that for which it was designed. The application had manifestly an intimidatory componentry, as evidenced by the personal citation of the various individual journalists and seeking costs against them personally, and the applicants should pay the costs as between attorney and client.
- [48] Ultimately a court has a discretion in awarding costs. A court will be cautious in awarding punitive costs against individuals in favour of a large Media house. In exercising my discretion in favour of such a punitive costs order I considered all (but not only) that which is mentioned in this judgment. I list the most egregious transgressions and most compelling facts and considerations to so order in what follows:

48.1. The unreasonably truncated time periods allowed to respond to the very wide relief sought and which was then abandoned.

48.2. The applicants are two politically connected businessmen who haven't suffered any stated prejudice from the use of the appellation in 16 years.

48.3. There was no need to cite the journalists in their individual capacities. There was no suggestion, nor could there be, that they were on a frolic of their own. This stratagem of citing them individually supports the inference of an ulterior objective, being to punish and to deter. The ineluctable inference is that the relief was sought to achieve a chilling purpose, making an example of the journalists.

48.4. Prior restraints on speech are invidious (interim interdicts against publication). They impinge on the right to freedom of expression

enshrined in section 16(1) of the Constitution. Restricting publications before they have even seen the light of day is something

which should be permitted in narrow circumstances only. This case does not meet that threshold. Although 'conjecture or speculation that prejudice might occur will not be enough'[18] not even that low bar was met in the context of the current relief sought i.e. the amended relief where the case law requires the applicants to show a 'substantial risk of grave injustice'.[19]

48.5. The failure to have joined the Mail & Guardian and Mr Brummer when the core of the application was founded on the 2007 article. They appear to have had a legal interest in the matter and this non-joinder may have precluded the granting of the relief in its original form.

48.6. The ineffectual nature of any relief which might have been granted lucidly explained by Molemela JA (as she then was) in her minority judgment in UDM v Lebashe (on an issue which the majority did not reach):

'Considering the above, the allegations were already in the public domain in any event. Only the appellants are not permitted to repeat them. An interim order under such circumstances is not only impotent, but artificial. It amounts to no more than what the law calls a brutum fulmen. This relates to one of the requisites for an interim interdict, namely the balance of convenience. On this score, it clearly did not favour the granting of an interim order, and the interim order should not have been granted in the first place.[20]

48.7. Even though the applicants contend that the matter contained in the July 2007 article and repeated in the 22 August 2022 article is defamatory, they have to date hereof not instituted proceedings for the final relief they believe they are entitled to. The inference this court draws from this failure is that they consider the term 'Alex Mafia' used on its own, sufficiently innocuous as not to merit legal action.

Order

I accordingly grant the following order:

[49] The matter is struck off the roll with costs, as between attorney and client, such costs to include the costs of two counsel where so employed.

I OPPERMAN

Judge of the High Court

Gauteng Local Division, Johannesburg

Counsel for the applicants:

Adv J Berger and Adv D Goosen

Instructed by:

Kuvashen Padayachee

Counsel for the Respondents:

Adv Max du Plessis SC and Adv Ben Winks

Willem de Klerk and Charl du Plessis

Date of hearing: 2 August 2023

Date of Judgment: 8 August 2023

[1] This the applicants say in their notice of motion is to be done within 30 days of the date upon which an order is handed down in this application.

[2] Paragraph

[8] of this judgment

[3] The list includes the podcast and invitation to the webinar relevant to these proceedings.

[4] As a general principle a journalist who has received information in confidence is justified in refusing to perform an act which would unmask the source – see *Mazetti Management Services (Pty) Ltd and Another v Amabhungane Centre for Investigative Journalism NPC and Others* [2023] ZAGPJHC 771 (3 July 2023) at para [45]

[5] *Mokate v United Democratic Movement and Another*

[2020] ZAGPPHC 377, para [7] (emphasis added).

[6] *Mabote v Fundudzi Media Pty Ltd t/a Sunday World* [2020] ZAGPJHC 287, para [28]

[7] See section 16 of the Films and Publications Act, 1996. The Press Council is also recognised by the Information Regulator under section 7(2) of the Protection of Personal Information Act, 2013.

[8] *Mabote v Fundudzi Media Pty Ltd t/a Sunday World*, *supra* at paras [30] – [36].

- [9] Print Media South Africa and Another v Minister of Home Affairs and Another
- [2012] ZACC 22; 2012 (6) SA 443 (CC); 2012 (12) BCLR 1346 (CC), para 44.
- [10] Publications Control Board v William Heinemann Ltd and Others 1965 (4) SA 137 (A) at 160E-F (emphasis added).
- [11] Mazetti Management Services (Pty) Ltd and Another v Amabhungane Centre for Investigative Journalism NPC and Others, supra at para [34].
- [12] Midi Television (Pty) Ltd v Director of Public Prosecutions (Western Cape)
- [2007] ZASCA 56; [2007] 3 All SA 318 (SCA); 2007 (9) BCLR 958 (SCA); 2007 (5) SA 540 (SCA), citing Hix Networking Technologies v System Publishers (Pty) Ltd
- [1996] ZASCA 107; 1997 (1) SA 391 (A) at 401D-G.
- [13] Malema v Rawula
- [2021] ZASCA 88.
- [14] Strategic Lawsuit Against Public Participation.
- [15] Phillips v Botha
- [1998] ZASCA 105; 1999 (2) SA 555 (SCA), 565E; Ascendis Animal Health (Pty) Ltd v Merck Sharpe Dohme Corporation
- [2019] ZACC 41; 2020 (1) SA 327 (CC); 2020 (1) BCLR 1 (CC), para 40.
- [16] Juta & Co Ltd v Legal and Financial Publishing Co (Pty) Ltd 1969 (4) SA 443 (C) at 445B-F.
- [17] Erasmus Superior Court Practice at D6–23.
- [18] Midi Television (Pty) Ltd v Director of Public Prosecutions (Western Cape), supra at para [19].
- [19] Attorney-General v British Broadcasting Corporation
- [1981] AC 303 (CA), 362 as quoted with approval in Print Media.
- [20] United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others
- [2021] ZASCA 4; [2021] 2 All SA 90 (SCA), para 60.

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Prepared on 13 October 2026 · Esheria